

MEMORANDUM

TO: The Honorable Senator John Martin
The Honorable Representative Theodore Koffman
Joint Standing Committee on Natural Resources

FROM: Dawn R. Gallagher, Commissioner, Department of
Environmental Protection

DATE: March 18, 2003

SUBJECT: Biennial Shoreland Zoning Report to the
Legislature

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I am pleased to submit the Department of Environmental Protection's biennial shoreland zoning report to the Legislature as required by section 449 of the Mandatory Shoreland Zoning Act. The report includes a description of assistance and supervision that the Department has provided to municipalities, a summary of shoreland zoning activities conducted by local code enforcement officers, and recommendations from the Department for legislation and program activities relating to shoreland zoning.

The Department would be pleased to discuss the contents of this report with the Committee at its convenience.

BIENNIAL SHORELAND ZONING REPORT
TO THE
ONE HUNDRED AND TWENTY-FIRST LEGISLATURE

Submitted by the:

**Department of Environmental Protection
Bureau of Land and Water Quality
Division of Land Resource Regulation
Shoreland Zoning Unit**

Pursuant to 38 M.R.S.A., Section 449

March 18, 2003

EXECUTIVE SUMMARY

The Mandatory Shoreland Zoning Act, Title 38 MRSA sections 435-449, requires Maine's organized municipalities to enact ordinances regulating land-use activities in shoreland areas. The Department establishes, through its *State of Maine Guidelines for Municipal Shoreland Zoning Ordinances*, minimum standards for the municipally adopted ordinances. It also provides general oversight of municipal administration and enforcement of shoreland zoning ordinances.

The Department's Shoreland Zoning Unit (Unit) continues to focus its efforts on education and assistance. These efforts are directed at local officials, the general public, and groups such as realtors and loggers. Training ranges from formal sessions with code enforcement officers seeking to obtain or retain certification, to informal discussions with members of local lake associations. The Unit maintains numerous informational booklets and leaflets such as an *Issue Profiles* relating to nonconforming structures and to vegetation removal in the shoreland zone. The Department's *Handbook for Shoreland Property Owners* remains a very popular booklet.

Staff continues to spend a great deal of time assisting local officials with permitting and enforcement issues. Hundreds of site visits were conducted to help local code enforcement officers and planning board members with ordinance administration. Many more calls for assistance were met through written and oral communications.

The Department staff reviewed 171 municipal ordinances and amendments for consistency with the requirements of the shoreland zoning law. Of those ordinances reviewed, 19 were granted conditional approval. Fifty-six state-imposed shoreland zoning ordinances were in effect as of February 28, 2003.

During the past two-year period the Department has been working with a stakeholders group to develop standards for publicly used trails. Public trails are becoming popular and the Department must ensure that new trails near our waters are created in an environmentally sound manner.

The option to the 30% expansion limitation for nonconforming structures in the shoreland zone has been in effect for nearly five years. Only 36

municipalities have adopted the option thus far. However, the Department expects that additional municipalities will adopt the new rule. Nearly all of the towns that have switched from the 30% expansion rule have been pleased with its easier administration.

Code enforcement officers are required to submit permit and enforcement data to the Department on a biennial basis. The reporting rate remains quite low, at just over 50%. The 240 reporting municipalities indicated that nearly 1000 new principal structures were constructed in the shoreland zone. There were more expansions of existing structures reporting than there were new structures. We believe this data is indicative of a continuing trend toward conversion of seasonal camps to year-round homes.

Again, consistent with the Department's previous report, code enforcement officers indicate that variances are being granted approximately 50% of the time. However, the number of variances requested dropped significantly.

The Department's enforcement case with the Town of Damariscotta and Lake Pemaquid Camping, Inc. was resolved in 2002. After oral arguments were taken before the Maine Supreme Court, the campground owner agreed to move the offending cabins 100 feet from the Lake Pemaquid, and to pay a penalty of \$350,000.

Finally, the Department recommends that the Mandatory Shoreland Zoning Law be amended by eliminating the requirement that ordinances regulate the area within 250 feet, horizontal distance, of the normal high-water line of a tidal water. Leaving the requirement that ordinances regulate the area within 250 feet of the upland edge of a coastal wetland will not result in a loss of regulated area, and will result in a law that is easier for the public to understand, and for town officials to administer.

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SHORELAND ZONING REPORT TO THE 121st LEGISLATURE

Prepared by the Department of Environmental Protection's
Shoreland Zoning Unit

Introduction

This report is submitted to the Maine Legislature pursuant to Title 38 M.R.S.A. section 449. Section 449 requires the Commissioner of Environmental Protection to biennially report on the implementation and impact of local shoreland zoning ordinances. The report must include:

1. a description of the assistance and supervision that the commissioner has provided to the municipalities in carrying out their shoreland zoning responsibilities;
2. a summary of the shoreland zoning violations investigated by municipal code enforcement officers; and
3. any recommendations for legislation relating to shoreland zoning.

Program Description

The Mandatory Shoreland Zoning Act, commonly referred to as the shoreland zoning law, was implemented in the early 1970's. The Act, as amended, requires all organized municipalities to enact ordinances relating to land use activities in the shoreland zone. The shoreland zone consists of land areas within 250 feet, horizontal distance, of the normal high-water line of great ponds, rivers and tidal waters; within 250 feet, horizontal distance, of the upland edge of freshwater and coastal wetlands; and within 75 feet, horizontal distance, of streams.

The Board of Environmental Protection (BEP) establishes minimum standards for the municipally adopted shoreland ordinances. Those minimum standards are contained in the State of Maine Guidelines for Municipal Shoreland Zoning Ordinances. The Act allows a municipality to enact a different set of standards than those of the Guidelines when it

documents to the Commissioner that special local conditions warrant other standards.

The Commissioner of Environmental Protection must approve all shoreland ordinances, and amendments thereto, before they become effective. If a municipality fails to adopt a suitable shoreland zoning ordinance, the Act requires the BEP to adopt a suitable ordinance for the municipality. The BEP-adopted ordinance is referred to as a *State-imposed ordinance*, and must be administered and enforced by the municipality just as if the municipality had adopted it.

The Department's shoreland zoning program currently has three staff positions assigned to it, although one of those positions has remained vacant since the Eastern Maine Regional Office (Bangor) staff member left her position for another Department job in the fall of 2002. Before this departure, the Department maintained staff with expertise in shoreland zoning matters in its Augusta, Portland and Bangor offices. The Department has been authorized to fill the vacant Bangor position, but current funding levels have prevented the Department from doing so. In the meantime, other staff within the Bureau are assisting with shoreland zoning issues to the extent possible.

The thrust of the staff of the shoreland zoning unit's effort is that of education and technical assistance. Enforcement efforts are sometimes necessary, but the Department places more emphasis on cooperation and assistance. Formal enforcement remains the last resort.

Assistance to Municipalities

Municipal assistance makes up the core of the Department's shoreland zoning efforts and is accomplished in numerous ways. The following are some of the activities that were undertaken during the past two-year period to assist municipalities with their shoreland zoning responsibilities.

1. Training. The Department continues to work cooperatively with the State Planning Office's *Code Enforcement Officer (CEO) Certification and Training Program*. In May of 2002 the shoreland zoning unit conducted day-long training sessions for code enforcement officers in the municipalities of Auburn, Bangor, Portland and Presque Isle. More than 200 town officials attended these sessions. The Department's training

efforts concentrated on ordinance standards, nonconforming structure standards, and application review scenarios. The Department and the State Planning Office are planning another series of training sessions in late April and/or early May of 2003.

The Department also has conducted educational presentations to regional, code enforcement officer associations. For example, shoreland zoning staff participated in association meetings in the mid-coast area, and in the Aroostook County and Androscoggin County regions.

During the past two years the Department has continued to inform municipal officials about the new alternative to the 30% expansion limitation for nonconforming structures. Response to this new option has been lukewarm, however. Only thirty-six municipalities of Maine's 450 municipalities have elected to adopt the alternative, although those that have adopted the new option are pleased with its implementation. A report on the optional expansion rule and its implementation was submitted to the Committee on Natural Resources earlier in this legislative session.

DEP staff conducted additional workshops for Regional Councils and for individual towns during the past two years. At training sessions sponsored by Regional Councils, Department staff is able to provide information to many towns in one location. While more-locally sponsored sessions are valuable, representatives from fewer towns are present. On the plus side however, town officials, including selectmen, are more likely to attend a locally sponsored program. During this reporting period the Department has held workshops for the towns of Beals, Bristol, Deer Isle, Embden, Gouldsboro, Harrison, Jonesport, Mount Desert, New Portland, Saco, Sedgwick, Standish, Surry, Upton, Washington and Yarmouth.

Training for realtors continues to be a high priority, as it is important that this profession know the shoreland zoning rules. During the two years covered by this report the Department, in cooperation with the University of Southern Maine Center for Real Estate Education, has conducted three-hour courses for realtors. Six of the courses covered both inland and coastal shoreland issues, while two of the courses were directed at coastal towns. The university has asked the Department to continue in these training efforts.

While the Shoreland Zoning Unit conducts many workshops for town officials and realtors, it also participates in many other workshops for other groups and organizations. Staff has spoken at meetings of lake associations, road associations, the Small Woodland Owners Association of Maine, logging contractors, professional foresters, surveying and engineering associations, and building contractors.

Although classroom training can be valuable, on-site field visits can provide the most effective training/assistance to town officials. During the past two years staff has provided that assistance, both administrative and enforcement related, on several hundred occasions. Furthermore, we have assisted, both verbally and in written form, on hundreds more occasions.

2. Educational Materials. The Department continues to publish the shoreland zoning newsletter, but the number of issues published has been down in the past two years. The editor of the newsletter left the Department and it took time for his replacement to gear-up for his new tasks. Last summer that new editor left the Department, again, leaving a void in the editor's position. The newsletter is a valuable tool for informing local officials regarding shoreland zoning issues. Therefore, the Department will strive to publish on a more regular basis in the coming biennium.

In addition to the *State of Maine Guideines for Municipal Shoreland Zoning Ordinances*, the Department maintains the following informational publications for local officials and the public:

- Maine Shoreland Zoning—Handbook for Shoreland Owners
- Issue Profile—The Mandatory Shoreland Zoning Act
- Issue Profile—Clearing of Vegetation in the Shoreland Zone
- Issue Profile—Nonconforming Structures in the Shoreland Zone
- Issue Profile—Alternative 75 Foot Shoreland Zone Adjacent to Certain Freshwater Wetlands

These documents are requested frequently, especially the Handbook for Shoreland Owners, which has been distributed to more than ten thousand

town officials, shoreland owners, realtors and prospective buyers. It has proven to be a very popular educational tool.

Staff is currently preparing another Issue Profile that will address setback measurements from coastal and freshwater wetlands, as well as from water bodies. There is much confusion regarding the appropriate method for determining setbacks from coastal areas. It is hoped that this Issue Profile will help to alleviate this problem. The document will be published during the coming spring months. The Department will also update the existing Issue Profiles during that same period.

The Department has maintained it's *shoreland zoning web page*. This page, found at <http://www.state.me.us/dep/blwq/docstand/szpage.htm>, includes many of the shoreland zoning unit's educational documents, including the *State of Maine Guidelines for Municipal Shoreland Zoning Ordinances*, all *Issue Profiles* and the *Shoreland Zoning Newsletters*.

3. Municipal Program Evaluations. In 1999 the Department began "auditing" various municipalities' administration and enforcement of their respective ordinances. In the past two years the Department has met with the ordinance administering officials in the towns of Bucksport, Ellsworth, Lyman, Portland, Searsport and Westmanland. The review consists of an evening with the chairpersons of the planning board, appeals board, and the selectpersons or councilors. In most cases, staff also spends time in the field with the code enforcement officer, reviewing recently permitted construction.

The Department believes that the audits are valuable to both the municipalities and this agency. Department staff are able to provide advice to the administering officials, while learning first-hand how well the particular town is performing its administrative and enforcement duties.

4. Ordinance Reviews. All newly adopted ordinances and amendments to those ordinances must be approved by the Commissioner of the Department before they become effective. During the past two years the Department has reviewed one hundred seventy-one (171) ordinances and amendments, as well as numerous comprehensive plans. One hundred fifty-one (151) ordinances were fully approved, one was not approved, and nineteen (19) were approved with conditions. Conditional approval

is granted when an ordinance contains deficiencies that can be addressed by attaching conditions, bringing the locally adopted ordinance in line with the Department's minimum Guidelines.

One town, Swanville, was removed from the list of municipalities with state-imposed shoreland zoning ordinances during the past two years. The full list of municipalities with state-imposed ordinances is found in Appendix A of this report.

5. Miscellaneous Technical Assistance. The greatest amount of staff time is spent responding, either through site visits, written correspondence, or by telephone, to requests and inquiries from town officials and the public. Hundreds of site visits were conducted, and hundreds of responses to inquiries were written. Phone calls continue to number in the thousands per year.

Evening meetings with local planning boards and boards of appeals also continue to be regular events for the shoreland zoning staff. However, with reduced staffing levels we will strive to participate in more regional events, rather than meetings that involve officials from only one town.

Other Initiatives and Activities

Staff has been active in a legislatively required, Department-led, stakeholders group that is studying the existing "point system" contained in the Guidelines' *Clearing of Vegetation for Development* standards. Those who have questioned the point system believe that larger trees are not given enough "weight", thereby giving smaller trees too much relative value. We are working with private foresters, as well as the Bureau of Forestry and the Land Use Regulation Commission in an effort to reach consensus on a revised system. Several concepts have been proposed, but the group must now assess the proposals in the field before finalizing its work.

Over the past year, the Department has been assessing its Guideline standards, and has drafted proposed amendments. Few of the proposed amendments would be significant changes to the Guideline standards. The intent of most changes is to clarify existing standards and to address administrative "glitches". The most significant proposals include new standards for "trails for non-motorized use by the public", and a proposal to require structures that are within the water setback area to be relocated further from the water, meeting the setback to the greatest practical extent,

whenever a foundation is being added. The Department expects to have the draft changes ready for public comment in the spring of this year.

Enforcement and Permit Related Activities

1. Reports from Municipal Code Enforcement Officers Relating to Permits. Municipal code enforcement officers are required, on a biennial basis, to report to the Commissioner on their permitting and enforcement activities in the shoreland zone. The Department provides a standard form to the code enforcement officers for their use.

The percentage of town code officers who submitted the reports decreased from 57% in 2000 to 53% in 2002. Two hundred and forty report forms were received for this reporting period. Thus, nearly half of the municipalities required to submit reports failed to do so. Despite efforts by the Department, including a second “reminder” in the Shoreland Zoning News, the return rate of the report forms remains quite low. Appendix B lists the municipalities that filed reports and includes much of the reported permit and enforcement information.

During the previous two-year reporting period, the percentage of reports indicating that no permitting activities took place was approximately 20%. For the current reporting period only 15% of the municipalities reported no shoreland activity.

The 240 reporting municipalities indicated that 982 new principal structures were built in the shoreland zone. During the previous reporting period, 269 communities reported 984 new principal structures. More expansions of structures (1323) were reported this period than were new structures (984). This data is indicative of a continuing trend toward the conversion of seasonal camps to year-round homes in the shoreland zone.

For every five new principal structures built there is one existing principal structure being replaced. In some instances, the replacement structure is being built further from the water than the original structure. This increase in setback is consistent with the requirements for nonconforming structures in the shoreland zone.

360 permits were issued for piers and docks. Most were granted in coastal areas, although numerous temporary docks were permitted on inland waters.

2. Reports from Code Enforcement Officers Relating to Variances.

Information relating to variances is also required from the code enforcement officer, although the board of appeals is responsible for the granting of variances and hearing administrative appeals. In the 1998-1999 reporting period, 48% of the number of variance applications heard were granted. In this reporting period, the percentage of variance applications approved (49%) has not changed significantly. Of 125 variance requests heard, 62 were granted. We are pleased, however, that the number of applications submitted for variances were reduced by nearly one half. If the trend continues it may indicate that boards of appeals are becoming stricter, resulting in fewer requests for variances.

3. Reports from Code Enforcement Officers Relating to Enforcement. The 240 reporting code enforcement officers investigated 985 complaints. Of those complaints, 480 involved activities that were confirmed to be violations of the local shoreland zoning ordinance. The nearly 2 to 1 ratio of alleged complaints to confirmed complaints is consistent with past reporting years.

Of the 480 confirmed violations, only 11 proceeded to the court system. Fifty-four were settled through administrative consent agreements. The remainder of the violations were resolved informally with the offending party. Informal enforcement is obviously preferred by municipal officials.

The most common types of violations continue to be: excessive clearing of vegetation; expansions of nonconforming structures beyond the 30% expansion limitation; and new construction within the required setback area. In the case of small lots we are also noting violations of lot clearing and lot coverage standards. Staff will devote a portion of our code officer training efforts on these issues during our spring training program.

4. Enforcement Action Initiated by the Department of Environmental Protection. The Department's primary formal enforcement action taken over the past four years has been resolved in the State's favor. That case, which initially began as the State of Maine vs. the Town of Damariscotta

and Lake Pemaquid Camping Inc., resulted in a Superior Court ruling that the campground must relocate numerous offending structures from the lake setback area. The judge also set a monetary penalty of more than eight million dollars. The Campground appealed to the Maine Supreme Judicial Court. Then, after oral arguments had been presented, and before the Court ruled on the matter, the State and the campground owners agreed to a settlement of more than \$300,000, in addition to the moving of the cabins. Staff believes that the media coverage of this case has been beneficial to the shoreland zoning program. The coverage has convinced numerous violators to “come clean” and address their respective violations. The Department is very pleased with the Attorney General's office for its diligent efforts to resolve this enforcement matter.

Recommendations and Related Issues

1. Removal of the Term “Tidal Waters” from the Shoreland Zoning Law. Since 1971, the Mandatory Shoreland Zoning Act has required municipalities to zone land areas within 250 feet, horizontal distance, of the normal high water line of tidal waters. In 1989, the law was amended to require municipalities to also zone land areas within 250 feet of the upland edge of coastal wetlands. At the time, the Legislature did not recognize that the change created an inconsistency in the law that results in confusion by municipal officials and the regulated community, particularly regarding setback measurements.

The term coastal wetland is defined as:

All tidal and subtidal lands; all lands below any identifiable debris line left by tidal action; all lands with vegetation present that is tolerant of salt water and occurs primarily in a salt water or estuarine habitat; and any swamp, marsh, bog, beach, flat or other contiguous low land which is subject to tidal action during the maximum spring tide level as identified in tide tables published by the National Ocean Service. Coastal wetlands may include portions of coastal dunes.

Based on the above definition, a “tidal water” is a subset of a coastal wetland. Thus, in coastal areas the law applies to two somewhat different areas, the more restrictive being the shoreland zone adjacent to the upland edge of a coastal wetland. The shoreland zone adjacent to a tidal water is measured from the normal high water line, which can be lower in

the topography than the upland edge of the coastal wetland. This inconsistency is very confusing to those who are not very familiar with the shoreland zoning law.

The Department recommends that the Mandatory Shoreland Zoning Law be amended by eliminating the requirement that ordinances regulate the area within 250 feet, horizontal distance, of the normal high-water line of a tidal water. Leaving the requirement that ordinances must regulate the area within 250 feet of the upland edge of a coastal wetland will not result in a loss of regulated area, and will result in a law that is easier for the public to understand, and for town officials to administer. (Legislative action required)

2. Need for Assessment of Effectiveness of the Shoreland Zoning Law.

In the previous biennial report the Shoreland Zoning Unit recommended that the Mandatory Shoreland Zoning Act and program be assessed for its effectiveness. The law has been in effect for more than 25 years, and while it is clear that the law has been beneficial for shoreland areas, including protection of water quality and wildlife habitat and the protection of natural beauty, it is not clear that all municipalities are effectively administering and enforcing their respective ordinances.

The shoreland zoning staff had planned to oversee an assessment during the past two years, with grant monies from the EPA. Unfortunately, that study has not yet been implemented, although the Department still believes a study would be beneficial. If funds are still available from existing grant monies, the Department will continue to pursue an independently run study. The assessment would address the Department's effectiveness in oversight of the law, the municipalities' administration of local shoreland zoning ordinances, coordination with the comprehensive planning program, and any recommendations for change in the administration of the law. (Legislative action not required)

3/18/03